Abdul Kassim bin Idris v Public Prosecutor

HIGH COURT (KUCHING) — CRIMINAL APPEAL NO 42–5 OF 2006-II
LAU BEE LAN J
18 DECEMBER 2006

Criminal Procedure — Sentence — Appeal against sentence — Appellant convicted under ss 326 and 316 of the Penal Code — Whether offences committed in one single transaction and not distinct and separate offences — Whether offences under ss 326 and 316 of the Penal Code were in the circumstances of the case, a principal and subsidiary offence respectively — Whether sentence had a crushing effect on appellant — Penal Code ss 316 and 326

The appellant was found guilty after a full trial and sentenced to 15 years imprisonment and three strokes of the whip for the first charge (s 326 of the Penal Code) and six years imprisonment for the second charge (s 316 of the Penal Code). Both sentences were ordered to run consecutively and the imprisonment sentences excluded the nine days' remand. The appellant's appeal was against the sentence. The appellant had urged the court to set aside the consecutive sentences and to order the sentences to run concurrently on the grounds: (i) that the offence under s 326 of the Penal Code and s 316 of the Penal Code were committed in one single transaction and therefore were not distinct and separate offences; (ii) the offences under ss 326 and 316 of the Penal Code were in the circumstances of the case, a principal and subsidiary offence respectively; and (iii) the consecutive sentence had a crushing effect on the appellant.

Held, dismissing the appeal:

(1) Section 316 of the Penal Code is to punish offences committed against children in the womb and s 316 is a specific offence because in the circumstances of this case, the child died as a result of the act of the appellant committed against the mother. On the other hand under s 326 of the Penal Code, the objective of the legislature is to punish the offender who caused grievous hurt to the victim. There were two victims involved as the injuries suffered by the mother and the 'quick unborn child' who died were different (see paras 6–7).

(2) Notwithstanding that the two offences under ss 326 and 316 of the Penal Code were committed in the course of a single transaction, the latter charge of causing the death of the 'quick unborn child' was not really subsidiary to the former charge of causing grievous hurt to the mother; rather they were separate and distinct offences (see para 13).

(3) Although it appeared that the total period of 21 years is long and will have a crushing effect on the appellant bearing in mind his relatively young age, it could not be forgotten that the appellant had acted in a despicable manner which had been noted by the learned sessions court judge as 'cold-blooded' and 'merciless' and undoubtedly he deserved the deterrent sentence imposed on him (see para 16).

[Bahasa Malaysia summary

Perayu didapati bersalah di hadapan satu perbicaraan penuh dan dihukum 15 tahun penjara dan tiga kali sebatan untuk pertuduhan pertama (s 326 Kanun Keseksaan) dan enam tahun penjara untuk pertuduhan kedua (s 316 Kanun Keseksaan). Kedua-dua hukuman diperintahkan untuk berjalan berturut-turut dan hukuman penjara tersebut tidak termasuk tahanan selama sembilan hari. Rayuan perayu adalah terhadap hukuman. Perayu memohon mahkamah mengetepikan hukuman berturut-turut itu dan untuk memerintahkan hukuman tersebut dilaksanakan serentak atas alasan: (i) bahawa kesalahan di bawah s 326 Kanun Keseksaan dan s 316 Kanun Keseksaan dilakukan dalam satu transaksi sahaja dan oleh demikian bukan kesalahan-kesalahan yang berbeza dan berasingan; (ii) kesalahan-kesalahan di bawah ss 326 dan 316 Kanun Keseksaan dalam keadaan kes tersebut, satu kesalahan yang utama dan subsidiari masing-masingnya; dan (iii) hukuman yang berturut-turut mempunyai kesan mendalam ke atas perayu.

Diputuskan, menolak rayuan:

(1) Seksyen 316 Kanun Keseksaan adalah untuk menghukum lesalahan-kesalahan yang dilakukan terhadap anak dalam kandungan dan s 316 adalah kesalahan spesifik kerana dalam keadaan kes ini, anak itu meninggal dunia akibat daripada tindakan perayu yang telah dilakukan terhadap ibunya. Sebaliknya di bawah s 326 Kanun Keseksaan, objektif badan perundangan adalah untuk menghukum pesalah yang menyebabkan kecederaan teruk ke atas mangsa. Terdapat dua mangsa terlibat kerana kecederaan yang dialami oleh ibu dan 'quick unborn child' yang meninggal adalah berbeza (lihat perenggan 6–7).

(2) Meskipun kedua-dua kesalahan di bawah ss 326 dan 316 Kanun Keseksaan telah dilakukan dalam satu transaksi sahaja, pertuduhan kedua menyebabkna kematian 'quick unborn child' bukanlah subsidiari kepada pertuduhan pertama yang menyebabkan kecederaan teruk kepada ibu, bahkan kedua-duanya adalah kesalahan-kesalahan yang berasingan dan berbeza (lihat perenggan 13).

(3) Meskipun kelihatan seperti keseluruhan tempoh 21 tahun adalah panjang dan akan memberikan kesan mendalam ke atas perayu mengambilkira umur mudanya, tidak boleh dilupakan bahawa perayu telah bertindak dalam perbuatan yang keji yang telah ditekankan oleh hakim mahkamah sesyen yang bijaksana sebagai 'cold-blooded' dan 'merciless' dan tanpa ragu beliau patut menerima hukuman pencegahan yang dikenakan ke atasnya (lihat perenggan 16).]

Notes

For cases on appeal against sentence, see 5(1) *Mallal's Digest* (4th Ed, 2004 Reissue) paras 3150–3191.

Cases referred to

Bachik bin Abdul Rahman v PP [2004] 2 MLJ 534 (refd)
Lee Chow Meng v PP [1976] 1 MLJ 287 (refd)
Yit Kean Hong v PP [2005] 4 CLJ 592 (refd)

Legislation referred to

Penal Code ss 302, 304, 307, 316, 326

Appeal from: Criminal Case No: SC–62–82 of 2004-I (Sessions Court, Kuching)

Anthony Tai (Anthony Tai & Co) for the appellant.
Yong Leou Shin (Deputy Public Prosecutor, Jabatan Peguam Sarawak, Kuching) for the respondent.

Lau Bee Lan J:

[1] The Appellant was found guilty on 6 March 2006 after a full trial and sentenced to 15 years imprisonment and three strokes of whipping for the first charge and six years imprisonment for the second charge. Both sentences were ordered to run consecutively and the imprisonment sentences excluded the nine days' remand. The first and the second charges are as follows respectively:

First charge

> That you, on 25th day of May 2004, at about 3pm, at a hill near the junction of Jln. Kampung Selang, Jln Matang, Kuching, in the State of Sarawak, voluntarily caused grevious hurt to MASNI BTE SAPONG (F) by using a pair of scissors which used as a weapon of offence, is likely to cause death, and you have thereby committed an offence punishable under s 326 of the Penal Code.

Second charge

> That you, on 25th day of May 2004, at about 3pm, at a hill near the junction of Jln. Kampung Selang, Jln. Matang, Kuching, in the State of Sarawak, did an act, namely by stabbing one MASNI BTE SAPONG (f) in the abdomen with a scissors and that if you had thereby caused the death of MASNI BTE SAPONG you would be guilty of culpable homicide, and by such act caused the death of the quick unborn child of MASNI BTE SAPONG, and you have thereby committed an offence punishable under s 316 of the Penal Code.

[2] The court has considered the submissions of the learned counsel for the appellant, Mr Anthony Tai and the learned DPP, Ms Yong Leou Shin for the respondent. The court's findings and evaluation are the following.

[3] Essentially the appellant's appeal dated 10 March 2006 (encl 2) is against the order made by the learned sessions court judge for the sentences of imprisonment to run consecutively. The appellant has urged the court to set aside the consecutive sentences and to order the sentences to run concurrently on basically the following grounds:

(i) that the offence under s 326 of the Penal Code and s 316 of the Penal Code were committed in one single transaction and therefore were not distinct and separate offences;

(ii) the offences under s 326 and s 316 of the Penal Code were in the circumstances of the case, a principal and subsidiary offence respectively; and

(iii) the consecutive sentence has a crushing effect on the appellant.

To support his argument, the learned counsel for the appellant relied solely on the case of *Yit Kean Hong v Public Prosecutor* [2005] 4 CLJ 592. The position taken by the appellant was opposed by the learned DPP on the strength of authorities which I will advert to hereafter.

[4] It is conceded by the learned counsel for the appellant that premised on *Yit Kean Hong*, the general principle applicable in deciding whether the sentences of imprisonment should run consecutively or concurrently has been enunciated by the Court of Appeal at p 600 paras b–c as follows: '[F]irst and foremost, the court must look at the *facts and circumstances of each case and the background of the accused*. Generally, *where two or more distinct offences have been committed, all sentences of imprisonment ought to be made consecutive.* On the other hand, *where the offences are committed in the course of a single transaction* ie where the second offence is subsidiary to the first offence, *the sentences of imprisonment ought to be made concurrent.*' (Emphasis added.) Learned counsel acknowledged that the rule is not absolute as such.

Mallal's Penal Law (2002) at p 529 para 316.1 (cited by the learned DPP) states that, 'Section 316 of the Penal Code makes it an offence to kill an unborn quick child, albeit without intention, whilst carrying out an act against the mother which act would amount to culpable homicide not amounting to murder if the mother suffered death'. At p 530 para 316.3, the text book authority further elaborated, 'The act referred to is not an act specifically carried out against the child in the womb but against the mother. If the child dies as a result of the said act, the act constitutes a specific offence under s 316. Nevertheless, this offence can only be committed against 'a quick unborn child'.' Further, the text book authority in the annotation to s 316 of the Penal Code states that unlike offences under s 312 of the Penal Code which deals with the offence causing miscarriage to a woman 'with child' or 'quick with child', in the case of s 316 of the Penal Code, it is unique in that, 'it does not describe the condition of the mother but describe the condition of the child. The Indian view is that the section punishes offences against children in the womb where the pregnancy has advanced beyond the stage of quickening and where the death is caused after the quickening and before the birth of the child.'

[5] According to PW17, Dr Choo Gim Sun, the medical doctor on call who examined the victim, Masni bte Sapong, her uterus was around 28 weeks pregnant

size (ROA/75 line 5). Therefore, I agree with the learned DPP that the objective of the legislature in enacting s 316 of the Penal Code is to punish offences committed against children in the womb and s 316 is a specific offence because in the circumstances of this case, the child died as a result of the act of the appellant committed against the mother (Masni bte Sapong). On the other hand under s 326 of the Penal Code, the objective of the legislature is to punish the offender who caused grievous hurt to the victim.

[6] I also agree with the learned DPP that it is patently clear that there are two victims involved as the injuries suffered by the mother, Masni bte Sapong and the 'quick unborn child' who died are different. From the evidence of PW16, Dr Azuraine bte Anorbasah, the medical officer who attended to Masni bte Sapong on 25 May 2004 at about 5pm at the Sarawak General Hospital, it can be seen that the victim suffered stab wounds and cut wound at the neck region and the abdominal region (ROA/72 line 10–ROA/73 line 5) whereas based on the Post-mortem Report, (ROA/244) the injuries suffered by her unborn baby are basically in the chest area and the cause of the death of the child being 'bilateral haemothorax due to stab wounds at the chest.'

[7] As pointed out by the learned DPP, I concede the elements of the offences are different. In the case of an offence under s 326 of the Penal Code, they are (i) accused caused grievous hurt; (ii) it was caused voluntarily; and (iii) it was caused by dangerous weapon. Whereas under s 316 of the Penal Code, according to *Ratanlal & Dhirajlal's Law of Crimes* Vol 2 (24th Ed, 1998) at p 1573, the prosecution must prove:

(i) that the woman was quick with child;

(ii) that the accused did an act to cause the death of such child;

(iii) that the circumstances, under which such act was done, were such as to make the accused guilty of culpable homicide, if death had been caused; and

(iv) that such act did cause the death of the quick unborn child.

[8] In *Yit Kean Hong*'s case, the Court of Appeal had referred to several decided cases at pp 600–602. One of the cases is the Court of Appeal case of *Bachik bin Abdul Rahman v Public Prosecutor* [2004] 2 MLJ 534 where His Lordship Nik Hashim JCA (now FCJ) at p 602 paras d–g of the former case quoted the judgment of Augustine Paul JCA (now FCJ) at p 579 para 7 of the latter case:

> The exercise of the discretion to determine the date of commencement of the sentence of imprisonment is dependent on the facts and circumstances of each case. In deciding whether the terms of imprisonment should be consecutive or commence at another date, the court will be guided by the one transaction rule and the totality principle … The rule, however, is not absolute. As Yong Pung How CJ said in *Kanagasuntharam v Public Prosecutor* [1992] 1 SLR 81 at p 83:
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> > *The English courts have recognized that there are situations where consecutive sentences are necessary to discourage the type of criminal conduct being punished: R v Faulkner [1972] 56 Cr App R 594, R v.Wheatley [1983] 5 Cr App R(S) 417 and R v Skinner [1986] 8 Cr App R(S) 166. The applicability of the exception is said to depend on the facts of the case and the*

> *circumstances of the offence*. It is stated in broad and general terms and although it may be criticized as vague, it is necessary in such terms in order that the sentencer may impose an appropriate sentence in each particular case upon each particular offender at the particular time the case is heard. (Emphasis added.)

[9] At p 603, the Court of Appeal in *Yit Kean Hong*'s case observed that the Court of Appeal in *Bachik*'s case had upheld the consecutive sentence of imprisonment and applied the exception to the one transaction rule and the totality principle in that it took the facts of the case and the circumstances of the offence into consideration in reviewing the sentences which were unrelated and of the same severity. In *Bachik*'s case,the appellant was sentenced to 18 years of imprisonment and 12 strokes of the rotan for an offence under s 376 of the Penal Code and the sentence was ordered to run consecutively to another term of imprisonment of 16 years which the appellant was serving for an offence of rape.

[10] Based on the headnotes in *Yit Kean Hong*'s case), the appellant was charged with two offences of murder under s 302 of the Penal Code and attempted murder s 307; the former charge was amended to a charge of culpable homicide under s 304 (first limb). The appellant pleaded guilty to both charges. The appellant had admitted to causing the death of one Lew Kuan Fook by pouring petrol on him and setting him on fire, and attempting to murder one Lew Kong Loy by cutting his throat several times with a knife. The appellant was sentenced to 15 years' imprisonment and the sentences were to run consecutively; and he appealed, inter alia, on the ground that the sentences were manifestly excessive and the imprisonment sentence should be made to run concurrently.

[11] At p 603 of the report, the Court of Appeal considered firstly, that the two offences committed by the appellant were very serious as they were punishable with imprisonment up to 20 years; secondly, there were two distinct offences and thirdly, two different victims. At para e of the same page, the Court of Appeal held:

> On the facts, the second charge of attempted murder was not really subsidiary to the first charge of culpable homicide, although the two offences were committed in the course of a single transaction. [Fourthly] [t]he victims suffered *two different types of injuries* and [fifthly] the *methods of inflicting them on the two victims were also different* from each other. (Emphasis added).

[12] Similarly in this present case, based on the reasons which I have alluded to above namely, the legislative intent of ss 326 and 316 of the Penal Code, the different elements to be proved under both sections, there are two victims involved and the injuries sustained are different, I agree with the learned DPP that notwithstanding that the two offences under ss 326 and 316 of the Penal Code were committed in the course of a single transaction, it behoves, on the Court to conclude that the latter charge of causing the death of 'the quick unborn child' is not really subsidiary to the former charge of causing grievous hurt to the mother; rather they are separate and distinct offences.

[13] Having regard to what I have said earlier, I find that the learned sessions court judge did not err when she followed the case of *Lee Chow Meng v Public Prosecutor* [1976] 1 MLJ 287 and stated at p 201 of the ROA lines 10–17:

> [T]he Court [High Court] held that the Court may, in appropriate cases, order the sentences of imprisonment to run concurrently. *The prime consideration is the circumstances attendant on each particular case. Having regards to the facts of the case and the severity of both offences* (even though s 316 is not a rampant offence), this case is clearly one where imprisonment sentences should be made to run consecutively. It will be wrong, in my view, to pass a concurrent sentence for that practically will mean the accused is only punished for a single offence. (Emphasis added.)

[14] I will now consider if there is merit on the crushing effect of the consecutive sentence. Apart from the facts of the case and the nature of both the offences, the learned sessions court judge had in passing sentence also borne in mind the mitigation of the appellant and the substantial degree of violence used by the appellant as she had made a finding of fact at p 200 lines 20–23 to p 201 lines 1–2 of the ROA, '[T]hat the accused had planned the cold-blooded attack on the victim and the unborn baby. He was very sane and clear in his mind when he inflicted the wounds mercilessly on the victim, which resulted in the loss of life of an innocent unborn baby and which also put the victim at the risk of dying had the doctor not successfully stopped the bleeding.' She had also considered the severity and the gravity of the offence and the public interest element when she said, at p 201 lines 1–7 of the ROA, 'Bearing in mind the gravity of the offence, I am of the view that the sentences should serve the following two purposes. Firstly, it should duly punish the accused for the grave crime that he had committed and secondly, in the interest of the public, it should be a warning and deterrence to the potential offenders. To my mind, to release the accused on bond of good behaviour is out of question given the severity of the offences.'

[15] Following the approach in *Yit Kean Hong*'s case although it appears that the total period of 21 years is long and will have a crushing effect on the appellant bearing in mind his relatively young age (39 at the time of mitigation on 1 March 2006), it cannot be forgotten that the appellant had acted in a despicable manner which has been noted by the learned sessions court judge as 'cold-blooded' and 'merciless' and undoubtedly he deserved the deterrent sentence imposed on him. Therefore, for the foregoing reasons, I am of the view that the learned sessions court judge did not err in applying the correct principles of sentencing in the exercise of her discretionary power in ordering the imprisonment sentences to run consecutively so as to warrant the court's interference. The sentences and order made by the learned sessions court judge are hereby affirmed.

Appeal dismissed.

Reported by Peter Ling